No. 634

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

GEORGE COTROS et al.,
Petitioners,

vs.

NASHVILLE TRUST COMPANY,
Executor Under Will of CHARLES McCABE, Former Collector Internal Revenue,
Respondent.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Sixth Circuit
and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners George Cotros et al., pray that a Writ of Certiorari issue to review the judgment, or decree, of the United States Circuit Court of Appeals for the Sixth Circuit, entered and filed June 5, 1941 (Record p. 85), and becoming final August 15, 1941, by the granting of a Petition to Rehear, wherein the original decree was modified (Record p. 97), said modified decree of the Circuit Court of Appeals reversing in part the judgment and decree rendered in said cause by the District Court of the United States for the Middle District of Tennessee (Record p. 97).

CASE STATED.

George Cotros et al., the Petitioners, sued the Collector of Internal Revenue at Nashville to recover a judgment or decree for the approximate sum of $25,000.00, paid under protest to the Collector, under a Deficiency Assessment for Income, Capital Stock and Excess Profits taxes, which had been assessed against them as an "Association" within the meaning of Paragraph 801 of the Revenue Act of 1934, after timely claim had been made for refund and a denial thereof (Record p. 2).

The United States District Court rendered a decree in favor of the Petitioners (Record p. 77).

From this judgment or decree the Collector (the Government) appealed; and the Court of Appeals at first reversed the decree of the District Court in its entirety, but later modified its ruling, pursuant to a Petition filed therefor, and granted to Petitioners a recovery of the Excess Profits taxes paid, which was at all times conceded to have been wrongfully collected (Record pp. 85, 97).

The decree of the Court of Appeals, together with its Opinion, upon which said decree was based, denied to the Petitioners any recovery on account of Income taxes and Capital Stock tax, in substance, holding that Petitioners were, in law, an Association taxable as a Corporation (Record p. 86).

FACTS.

The facts are wholly without dispute and are these:

One Guidry had acquired from the State of Louisiana an oil lease, and he, in turn, had assigned all of his interest therein to William Helis, who, in turn, transferred the leasehold interest to the Lincoln Oil Company (Record p. 20).

In August, 1933, the Lincoln Oil Company assigned and transferred unto John A. Papageorge, George Cotros and Nick Taras an undivided one-third interest in said leasehold, which covered 2,640 feet of the bed of Bayou La Fourche (Record, Exhibit A). The consideration was $20,000.00, this sum being advanced, or paid, by Cotros, Papageorge and Taras to the Lincoln Oil Company, and represented approximately one-third of the cost of developing the property for oil (Record p. 21 and Exhibit A). Under the terms of the lease the expenses in connection with the operation of any wells discovered upon the property were to be paid out of the revenue derived from the oil produced (Record, Exhibit A). Cotros, P. and T. later were solicited by friends in Memphis for an interest in the leasehold (fractional part owned by C., P. and T.), and not caring to take the hazard of being out the entire $20,000.00, they, C., P. and T. agreed to permit their friends to acquire an interest therein. Evidencing the interest so acquired in the leasehold, the parties, C., P. and T., on the one hand, and their friends who sought an interest in the leasehold, on the other hand, entered into a contract which, in the Record, is known as the Indenture Agreement, and which is to be found in its entirety in the Record, pages 23-28.

The preamble of this contract referred to the fractional one-third interest in the leasehold acquired by C., P. and T. and to the fact that said parties had agreed to pay therefor the sum of $20,000.00, and that "the parties whose names are annexed hereto, other than George Cotros, John Papageorge, Nick Taras, desire to obtain an interest in the profits to be derived from, and on account of, the leasehold interest assigned * * *; and that C., P. and T. are willing that said other parties may have an interest in said profits upon payment of the amounts set opposite their respective names hereafter shown, and in the proportion which the respective amounts appearing opposite the

names bear to the sum of $20,000.00," it was, therefore, agreed—

1. That the parties whose names were subscribed to the instrument, excluding Cotros, Papageorge and Taras, were entitled to an interest in the net proceeds or profits derived from the production of the oil, gas and minerals "from said leasehold interest" to the extent that the amount set opposite their names bore to $20,000.00.

2. That Cotros, P. and T. were to be entitled to share equally in said profits derived from the oil and minerals produced from said leasehold estate to the extent that the difference between the total amount subscribed by the other parties bore to the sum of $20,000.00.

> "The said George Cotros, John Papageorge and Nick Taras, in whose names the title to said leasehold interest stands (same having been transferred to them by the Lincoln Oil Company * * *), are Trustees for the benefit of all parties whose names are annexed to this instrument. They are given full power and control over said *leasehold interest;* to manage that interest (Leasehold) as they see fit; to sell, assign or transfer the same at any time, and for any amount which to them seems to be right and proper, so long as they act in good faith and make a proper accounting to the others who are parties to this instrument * * *." (Italics ours.)

This Indenture was signed by some twenty-two parties who paid to Cotros, P. and T. for the interest acquired $4,150.00. It was likewise signed by Cotros, P. and T. (Record pp. 26-28).

The interest thus acquired by the parties to the instrument, other than Cotros, P. and T., represented 4,150/20,000ths in the leasehold estate, Cotros, P. and T. retaining the remaining interest.

Prior to the execution of the Indenture referred to

above, Cotros, P. and T. gave a power of attorney to the Lincoln Oil Company, authorizing them to market and sell all oil, gas and minerals produced upon the property covered by the leasehold. The date of this power of attorney is February, 1934 (Record, Exhibit 1, Cotros-Cross).

After the execution of the Indenture there was only one meeting of all of the parties thereto, which was called by Cotros, P. and T. for the purpose of determining whether they should sell the leasehold interest (fractional one-third) (Record p. 35).

No office was retained, no books kept, no sale had, no other interest acquired, no investments of any character made, no certificates of interest issued; in short, nothing was done by Cotros, P. and T. other than the receipt from the Lincoln Oil Co. of the net revenue due from the oil produced on the leasehold, and the distribution thereof by check to the parties entitled thereto under the Indenture (Record pp. 33-35).

There was only one copy made of the Indenture (the original), and that was retained by Cotros, P. and T. Later a copy was made for one or two of the other parties (Record p. 29).

Cotros, P. and T. had nothing whatever to do with any of the business relating to the drilling of wells, and payment of expenses in connection therewith, or the collection of the revenues derived therefrom. These matters were handled exclusively by the Lincoln Oil Company owning an undivided two-thirds interest in the leasehold. Neither did Cotros, P. and T. have anything to do with the marketing of the oil produced. The sole act performed by them, as Trustees, or individuals, was to receive from the Lincoln Oil Company the net amount to which they were entitled for the one-third interest and the pro rata distribution thereof to the parties entitled thereto, under the instrument of April 17, 1934 (Record pp. 30-32).

The group under the Indenture of April, 1934, made a partnership return to the Internal Revenue Department of the amounts received by them, and, individually, they paid income tax upon said income (Record pp. 68-74).

There was never any other lease or contract of any character in which the parties to the Indenture were jointly interested. This was the sole matter in which there was a common interest (Record p. 36).

THE DISTRICT COURT'S FINDING.

The Trial Court held that Cotros, P. and T. acquired a one-third undivided interest in the leasehold and became tenants in common with the Lincoln Oil Company in said lease; that the Lincoln Oil Company, with respect to the handling of all matters pertaining to the development of the oil, and the production and sale thereof, was merely acting as an agent for Cotros, P. and T.; that the parties other than Cotros, P. and T. likewise became tenants in common in the ownership of the property, "they owning a fractional part of the one-third undivided interest and achieving a unity of purpose and operation only through having a common agent. They had no agreement or arrangement among themselves as a group providing for the essential requirements of corporate control of the enterprise. The Court holds * * * there was no aggregation of individuals or separate entity having the attributes of a corporation," but were merely tenants in common of a fractional interest of a leasehold, "and did not constitute an Association taxable as a Corporation," under the Revenue Laws (Record pp. 75-76).

RULING OF COURT OF APPEALS.

The Appellate Court, in reversing the District Court, held that those whose names were annexed to the Indenture of April, 1934, constituted an Association taxable as a Cor-

poration, under the Revenue Laws, basing this conclusion solely upon the authority of *Helvering v. Combs*, 296 U. S. Rep. 365 (Record p. 86).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court with respect to this Petition seeking a right of Review by Certiorari is invoked under Section 347, Title 28, U. S. Code Annotated, being Section 240 (a) of the Judicial Code as Amended.

QUESTION PRESENTED.

Under the facts stated, are the parties to the Indenture of April, 1934, to be treated as an "Association" taxable under the Revenue Laws as a "Corporation," or

Are they to be treated as a Syndicate or Joint Venture, taxable as a Partnership?

U. S. Code Ann., Vol. 26, Sec. 1696 (Sec. 801, Revenue Act 1941).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Opinion and Decree of the Circuit Court of Appeals is untenable and at variance with applicable decisions of this Court, to wit:

Lewis v. Commissioner, 301 U. S. 385.

And is not in accordance with the principles enunciated in

Morrissey v. Commissioner, 296 U. S. 344, and
Helvering v. Combs, 296 U. S. 395.

And is in conflict and at variance with the decisions of the Circuit Court of Appeals of the Fifth Circuit, to wit:

Commissioner v. Horseshoe Syndicate, 110 Fed. (2) 748;
Commissioner v. Rector, 111 Fed. (2) 332.

And is in conflict and at variance with the decisions of the Circuit Court of Appeals for the Ninth Circuit, to wit:

Myers v. Commissioner, 89 Fed. (2) 86;
Commissioner v. Gerstle, 95 Fed. (2) 587.

And is in conflict and at variance with the decisions of the Second Circuit Court of Appeals.

Commissioner v. Chase Nat'l Bank, Aug. 14, 1941.

The annexed Brief, which is prayed to be taken as a part hereof, analyzes the above authorities, and in our humble opinion will disclose that the decision of the Court of Appeals for the Sixth Circuit in the instant case is untenable.

CONCLUSION.

Your Petitioners present herewith a Transcript of the Record in the Circuit Court of Appeals and pray that a Writ of Certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court a full and complete Transcript of all the proceedings of said Court of Appeals in said case, **Nashville Trust Company, Executor etc. v. George Cotros et al.**, No. 8641 of said Court, to the end that said case may be reviewed and determined by this Court as provided by law; that your Petitioners may have such other and further relief or remedy in the premises as may seem appropriate, and that the Decree of the said Court of Appeals in said case be reversed by this Honorable Court, and your Petitioners will ever pray.

Robt. Lee Bartels

Foley Earl Hagler

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IN THE

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GEORGE COTROS et al.,
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vs.

NASHVILLE TRUST COMPANY, Executor Under Will of CHARLES McCABE, Former Collector Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

APPLICABLE STATUTE.

"The term 'Corporation' includes associations, joint stock companies and insurance companies.

"The term 'Partnership' includes a syndicate, group, pool, joint venture or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term 'Partner' includes a member in such syndicate, group, pool, joint venture or organization."

U. S. Code Ann., Vol. 26, Sec. 1696.

QUESTION PRESENTED.

Are George Cotros and those who signed the Indenture of April, 1934, to be treated as an Association taxable as a Corporation under the above-quoted Statute?

The District Court answered this question in the negative, while the Court of Appeals answered in the affirmative, basing its decision solely upon the decision of this Court in *Helvering v. Combs,* 296 U. S. 365.

It is obvious, therefore, that if the instant case is governed by *Helvering v. Combs,* supra, the Petition for Certiorari should be denied.

If, on the other hand, the instant case is not parallel with *Helvering v. Combs,* but is to be determined under the principles announced in the case of *Lewis v. Commissioner,* 301 U. S. 385, and kindred Federal Appellate decisions, then the Writ should be granted.

GOVERNMENT'S CONTENTION.

It is the insistence of the Government that Paragraph 4 of the Indenture of April, 1934, created an express Trust in the nature of a business Trust; that this Trust was engaged in a business enterprise in developing and producing and in the marketing and sale of oil, such business activity being conducted by Cotros, Papageorge and Taras acting as Trustees for the benefit of all whose names were on the Indenture.

PETITIONERS' CONTENTIONS.

1. The parties to the Indenture of April, 1934, were tenants in common with each other, with respect to the fractional interest in the leasehold estate.

2. The character of the group, under the instrument of April, 1934, was that of a Joint Venture.

3. The purpose of the Indenture was not to finance the development of oil wells and engage in the business thereof—the wells were financed long prior to the creation of the so-called Trust, or the execution of the Indenture of April, 1934. The purpose was to hold and conserve the fractional leasehold interest for the benefit of the parties thereto; to receive and distribute the income therefrom.

4. The parties to the instrument of April, 1934, were not engaged, either through themselves or through the parties named as Trustees, in carrying on a business enterprise.

5. Even though it be said that some business activity was performed by the Trustees, Cotros, Papageorge and Taras, such was purely incidental to the mere collection of the income derived from the ownership of the fractional leasehold interest and the distribution thereof.

6. None of the attributes of a corporation or legal entity, such as an Association with corporate powers, existed.

CHARACTER OF INTEREST ACQUIRED UNDER INDENTURE.

In Revenue cases State Laws are controlling as to the **character** of interest acquired in property.

Crooks v. Harrelson, 282 U. S. 55;
Poe v. Seaborn, 282 U. S. 101;
Everts v. Commissioner, 38 B. T. A. 1039.

The Federal Appellate Court said this was immaterial, as the law itself (Statute above quoted) furnished its own criteria.

True, but the Statute defines a "Joint Venture" as a "Partnership," and not taxable as an "Association."

The property upon which the leasehold existed was in the State of Louisiana. The Supreme Court of Louisiana has held that an agreement between two or more persons

to engage in the buying of oil and gas leases on which to drill for oil for joint account and divide the profits is a "Joint Adventure."

Emerson v. Shirley, 188 La. 196.

The Federal Appellate Court for the Fifth District has held that one to whom is assigned an interest in an oil lease acquires an interest in real estate.

Hamilton v. Glassell, 57 Fed. (2) 1032.

PETITIONERS JOINT ADVENTURERS.

A "Joint Adventure" has been defined as "a special combination of two or more persons where in some specific venture a profit is jointly sought without actual partnership or corporate designation."

Bowmaster v. Carroll, 23 Fed. (2) 825;
Tompkins v. Commissioner, 97 Fed. (2) 396.

The Tompkins case, supra (a Revenue case), defines a "Joint Venture" as: "an Association of two or more persons to carry out a single business enterprise for profit."

Likewise, the Federal Appellate Courts, where the *res* is an interest in real estate, make little distinction between one owning an undivided interest in a leasehold as a Tenant in Common and a Joint Adventurer interested in profits to be derived from the leasehold.

Clark v. Sidway, 142 U. S. 682, Opin. 690.

The fact that a contract which constitutes a joint venture fails to provide specifically for sharing in the losses, but only refers to sharing in the profits, does not relieve the parties thereto of liability for losses, nor is it decisive of the issue as to whether or not the undertaking is a joint venture.

First Mechanics Bank v. Commissioner, 91 Fed. (2) 275.

The Government, according to its Brief filed in the Appellate Court, conceded that Cotros, Papageorge and Taras were, prior to the instrument of April, 1934, tenants in common with the Lincoln Oil Company.

Gov't's Brief, Appellate Ct., p. 9.

The Government's counsel, likewise, impliedly concedes that if the fractional interest of the parties to the Indenture was an interest in the leasehold, i. e., the real property itself, the Morrissey and Combs cases would not apply.

Gov't's Brief, Appellate Court, pp. 9, 14.

MORRISSEY AND COMBS CASES NOT APPLICABLE.

"It (Association) may be defined as a body of persons acting together without a charter, but using the methods and forms of corporate bodies in the perfection of some business enterprise for profit.

"It implies the entering into a joint enterprise * * * an enterprise for the transaction of business."

Morrissey v. Commissioner, 296 U. S. 344.

"The mere receipt of income from leased property and its distribution to cestuis que trustent amounts to no more than receiving the ordinary fruits that arise from the ownership of property and does not constitute *doing business* * * *. The power of the Trustees to receive rents and distribute them to certificate holders did not have the effect of making it an Association for profit; nor did the right to possess and dispose of the property * * * have that effect, but was a mere incidental power." (Italics ours.)

Cleveland Trust v. Commissioner, 115 Fed. (2) 481, Opin. 483-84;
Lewis v. Commissioner, 301 U. S. 385;
Commissioner v. Chase Nat'l Bank, Aug. 14, 1941.

Chief Justice Hughes, in the *Morrissey* case, stated that the paramount issue in determining whether a Trust was an Association within the meaning of the Revenue Laws lay in the fact that such Trust was engaged in the transaction of a business enterprise, "doing of business."

Said this Court with respect to an Excise tax imposed by the Revenue Act of 1909 upon corporations "engaged in business"—

> "The mere receipt of income from property and the payment of administration expense incidental to the receipt and distribution thereof (does not) constitute such a business ('doing business') as is taxable within the meaning of the Act."
>
> *McCoach v. Minehill R. R.*, 228 U. S. 298, Opin. 306-308.

Before analyzing or differentiating the Combs case from the instant case, we think the above quotations apt in disclosing the essential elements under which a syndicate, or joint group of persons, without charter, is to be treated as an Association taxable as a corporation under the Revenue Laws, and the distinguishing elements when it is not to be so taxed.

That is to say with respect to a Trust—

A. The carrying on of a business enterprise for profit after the method and manner of a corporation, legal title being vested in the Trustees, with transferable certificates of interest and limitation of liability, is an "Association" taxable as a corporation.

B. But the mere receipt by Trustees, named in a declaration of trust, of income from property leased or jointly held does not create, under the law, an Association taxable as a Corporation, even though the Trustees are given power incidental to the main purpose of the Trust, to lease, sell, manage, control or dispose of the property.

These conclusions are supported by

Lewis v. Commissioner, 301 U. S. 385;
Commissioner v. Chase Nat'l Bank (2nd Cir.), August 14, 1941;
McKeen v. Scofield, Collector, 108 Fed. (2) 764;
Myers v. Commissioner, 89 Fed. (2) 86;
Commissioner v. Whitcomb Coca Cola Syndicate, 95 Fed. (2) 596.

It will be noted that beyond question the original relation between Cotros, Papageorge and Taras and the Lincoln Oil Company was that of a tenancy in common, each owning a fractional leasehold undivided interest in the bed of a Bayou;

That for the interest acquired by Cotros, Papageorge and Taras they paid to the Lincoln Oil Company (who owned the entire leasehold interest) $20,000.00;

That the Lincoln Oil Company undertook to develop and drill for oil upon the leasehold interest, Cotros, Papageorge and Taras having nothing whatever to do therewith;

That, under the terms of the lease, operating expenses incurred after the discovery of oil were to be defrayed proportionately, and the Record shows that they were deducted by the Lincoln Oil Company, and the net proceeds remitted to Cotros, Papageorge and Taras (Record p. 33);

That in February, following the execution of the lease in August prior thereto, and either during the course of the drilling, or after oil had been struck, Cotros, Papageorge and Taras gave a power of attorney to the Lincoln Oil Company, authorizing it to handle and market and sell the oil produced and to remit to them their proportionate share of the net revenue with a statement of account (Exhibit 1, Cotros, and Record p. 32);

That subsequent to the execution and delivery of this

power of attorney the Indenture of April, 1934, was entered into (Record p. 26).

The sole contention of the Government is that Paragraph 4 of the Indenture changed the relationship of the parties from that of joint venturers, or tenants in common, to an Association taxable as a Corporation.

Gov't's Brief in Ct. Apps., p. 9.

Concededly, if this Indenture had not contained the so-called declaration of trust, the parties thereto would not have been taxed as an Association, but merely as a partnership or joint venturers. While clause 4 of the Indenture gave to Cotros, Papageorge and Taras the right to control the leasehold interest and to sell or dispose of same, all the while making a proper accounting to the other parties to the instrument, yet—

The legal title to the leasehold interest never vested in Cotros, Papageorge and Taras, as **Trustees**; they, as individuals, had the legal title under the lease from the Lincoln Oil Company, and could, at all times, as individuals, have sold or disposed of the lease. Whether we regard the other parties to the instrument of April, 1934, as equitable owners of a fractional interest in the leasehold, or as equitable owners of the income to be derived therefrom, the fact remains that other than calling Cotros, Papageorge and Taras "Trustees," their duties were no more, nor less, than to collect the income and properly account therefor by distributing the proceeds—in other words, the creation of the legal relationship of principal and agent.

In the language of this Court in the Lewis case:

> "There is to be found in the operation of the business (collection of rents and proceeds derived from the sale of land subdivided) no essential characteristic of corporate control—nothing analogous to a Board of Directors or shareholders, no exemption from personal

liability, no issue of transferable certificates of interest. There is simply the common relationship of principal and agent, coupled with the collateral incidents of an ordinary trust."

301 U. S., Opin. 389.

DISTINGUISHING CHARACTERISTICS OF INSTANT CASE FROM HELVERING v. COMBS.

1.

Combs Case.

We have obtained a certified copy of the Transcript of Record of the Helvering-Combs case, submitted to and decided by this Court at the October Term, 1935, and here desire to direct the Court's attention to the facts therein from which this Court held the Association there to be, in all respects, similar to a corporation, to wit:

1. Under the law of California, the Corporate Securities Act required that an express trust, organized for the purpose of selling securities evidenced by beneficial certificates or otherwise, should be filed with the Commissioner of Corporations and a permit obtained for such sale and a copy of the Trust Declaration filed.

Deering's General Laws of California, Section 3814, Vol. 2, p. 1924.

2. Having in mind the public issuance and sale of beneficial certificates, Everett and Combs, as Trustees, applied to the Commissioner of Corporations for a permit to that end, and filed with the Commissioner, a Declaration of Trust, the purpose of which was to finance and drill a well for the production and sale of oil. In the inception they were joined in the enterprise by the Hub Oil Company and Sheridan Bailes, an oil driller. Just as in a charter of incorporation, it was set out that the purpose of these par-

ties was to finance and drill a well for the production of oil, and to sell the production thereof, and to issue beneficial certificates to those who might become interested in the project.

3. Under the Trust instrument the Trustees as such were vested with legal title to the property—the entire leasehold having been assigned to them; they were to use the money dposited by the beneficiaries for materials incident to the drilling; to pay for the drilling; to manage and protect the Trust property; to pay the Trust debts; to sell and contract for the sale of the products of the well; to borrow money upon the credit of the Trust; to pledge the interest of the entire Trust property for the payment of debts; to issue and sell beneficial interest evidenced by certificates transferable only on the books of the Trust by surrender of the original certificates, etc.; to sell unsold beneficial interest for the benefit of the Trust. The Trustees were not to be individually liable. Each holder of a beneficial certificate was required to pay the sum subscribed to the Bank of Italy for the benefit of the Trust.

Transcript of Record, Helvering v. Combs, No. 238, October Term, 1935, pp. 36-43.

The Circuit Court of Appeals in the *Combs* case found the following:

1. It was **conceded** that the Trust was organized for the purpose of doing business and actually conducted a business enterprise.

2. That the Trust Agreement gave to the Trustees powers over the property of the Trust similar to those of a Board of Directors of a Corporation.

3. The beneficiaries—i. e., those who bought beneficial interest or certificates—had no participation in the selection of the Trustees or their successors.

4. The Trustees as such handled and controlled the marketing of the oil as well as the production thereof.

The issuance of beneficial certificates was subject to the approval of the Commissioner of Corporations.

Opin. Wilbur Circuit Judge, p. 5, Transcript of Record in this Court.

The facts found by the Circuit Court of Appeals were not questioned or contradicted in this Court, and, in addition thereto, this Court found:

That the beneficial certificates under the Trust Agreement were transferable only upon the books of the Trustees and endorsement and surrender of the certificates;

That the Trustees were authorized to hold all property, the legal title to which vested in them under the Trust, and to use the moneys deposited by the beneficiaries to pay for labor, casing and other materials incident to drilling and production; to pay Trust debts, sell products of the well, borrow money and sell unsold beneficial interest as they might deem best for Trust purposes.

Under these facts, this Court held that the parties joined in a common enterprise for the transaction of business; that the purchasers of beneficial interests were to be treated as *original parties* to the *enterprise* or joint undertaking prescribed by the Declaration of Trust, they being named (referred to) *therein as parties to the Trust,* designated as "Beneficiaries" (similar to shareholders in a corporation); and thus "they avoided the characteristic responsibilities of partnership and secured advantages analogous to those which pertain to corporate organization."

2.

Instant Case.

In the instant case there was no trust created for the purpose of financing and developing an oil well, or other property; no creation of a trust for the purpose of selling beneficial interests in the oil well to be developed; nothing done by Cotros, Papageorge and Taras, either prior or subsequent to the Indenture of April, 1934, analogous to a corporation or to the doing of business after the method and manner of a corporation.

So far as the "Trust" created under the Indenture of April, 1934, is concerned, it was confined to the management and control of the interest of the parties whose names were annexed thereto, and in the performance of such duties imposed upon the Trustees nothing was done, or contemplated to be done, other than the mere collection of income and the distribution thereof.

The property rights of the beneficiaries under the Indenture were those of a purchaser of a fractional part of a fractional part of a leasehold; there was no undertaking on their part to enter into a business enterprise; they were concerned only in receiving income from that which they bought, and the placing of their interest in the hands of Cotros, Papageorge and Taras was merely to have someone act for them in managing their investment.

There was nothing whatever in the Indenture Instrument, or in the creation of the so-called Trust, in Paragraph 4 thereof, which, by analogy, could be said to be engaging in a business enterprise to escape the responsibilities of a partner or Joint Venturer—nothing corresponding to an Association similar in characteristics, or otherwise, to a corporation.

The purpose of the Indenture was only to conserve and invest and receive the fruits therefrom. The powers of the Trustees were purely incidental to this purpose, and this is evidenced by the fact that the only functions performed by the Trustees consisted of the collection of the income and the distribution thereof.

We respectfully insist there is no analogy between the Combs case and the instant case; that the principles announced in Combs and Morrissey cases do not apply here, but rather is the present case controlled by

Lewis v. Commissioner, 301 U. S. 385, and
Commissioner v. Chase Nat'l Bank, Aug. 14, 1941.

Briefly referring to the recent Federal Decision of the Second Circuit, *supra*—

The Bank was the Trustee in a trust agreement made with the American Depositor Corporation, whereby certain fixed trusts, called "Corporate Shares," came into being. The purpose of the trust was to enable investors to acquire an interest in a list of securities, and they were given certificates showing their interest in the "Trust Shares." The Trustee had large powers to sell and reinvest the property rights acquired under the Trust Agreement. Certificate holders were expressly relieved of liability—persons dealing with the Trustee looking only to the Trust property. Trustee administered the trust in accordance with the agreement, and from time to time distributed the profits (income) to the holders of certificates. The Court of Appeals, Second Circuit, held this Trust was not to be treated as an Association taxable as a Corporation under Section 801 (a) of 1934 Revenue Act, saying:

> "The principles set forth in *Morrissey v. Commissioner*, 296 U. S. 44, leads to the conclusion * * * that the trust property was to be held for investment,

and not to be used as capital in the transaction of business for profit like a Corporation organized for such a purpose * * *. The Board of Tax Appeals found that there was no exercise by the Trustee, the depositor, or both combined, of any powers beyond those which are necessary incidents to the preservation of trust property, the collection of income therefrom, and its distribution to the holders of trust shares. That being so, these trusts do not fall within the statute upon which the Commissioner relies."

THE POWER OF ATTORNEY.

In an effort to maintain that the "Trust" was engaged in a business enterprise, the learned Counsel for the Government insists that inasmuch as *prior* to the execution of the Indenture, Cotros, Papageorge and Taras gave a power of attorney to the Lincoln Oil Company, authorizing it to market and sell the oil produced from the wells, they thus "engaged in business"—that the act of the agent is to be treated as the act of the Principal—and they claimed that as this Power of Attorney was not revoked after the execution of the Indenture, it inured to the benefit of all parties to that agreement, and hence the "business" of selling the oil is to be treated as the "business" of the syndicate.

Without undertaking to argue that this conclusion is a "*non sequitur,*" suffice it to say that the mere sale of oil derived from a well by the owners thereof is a necessary incident to the enjoyment of the fruits of the production—the only way by which the owners can obtain the benefit of that which the soil produced. They might as well argue that a group of farmers who sell their produce through a common agent is engaged in business, which makes them an association taxable as a corporation.

Whether Cotros, Papageorge and Taras sold the oil, or

did so through an agent, certainly such sale does not constitute "doing business." In no other way could the producer of the oil derive any benefit from his investment.

We respectfully ask that the Petition be granted and that the Writ issue.

Walter Lee Bartels

Felix Earl Hagler

Solicitors for Petitioners.

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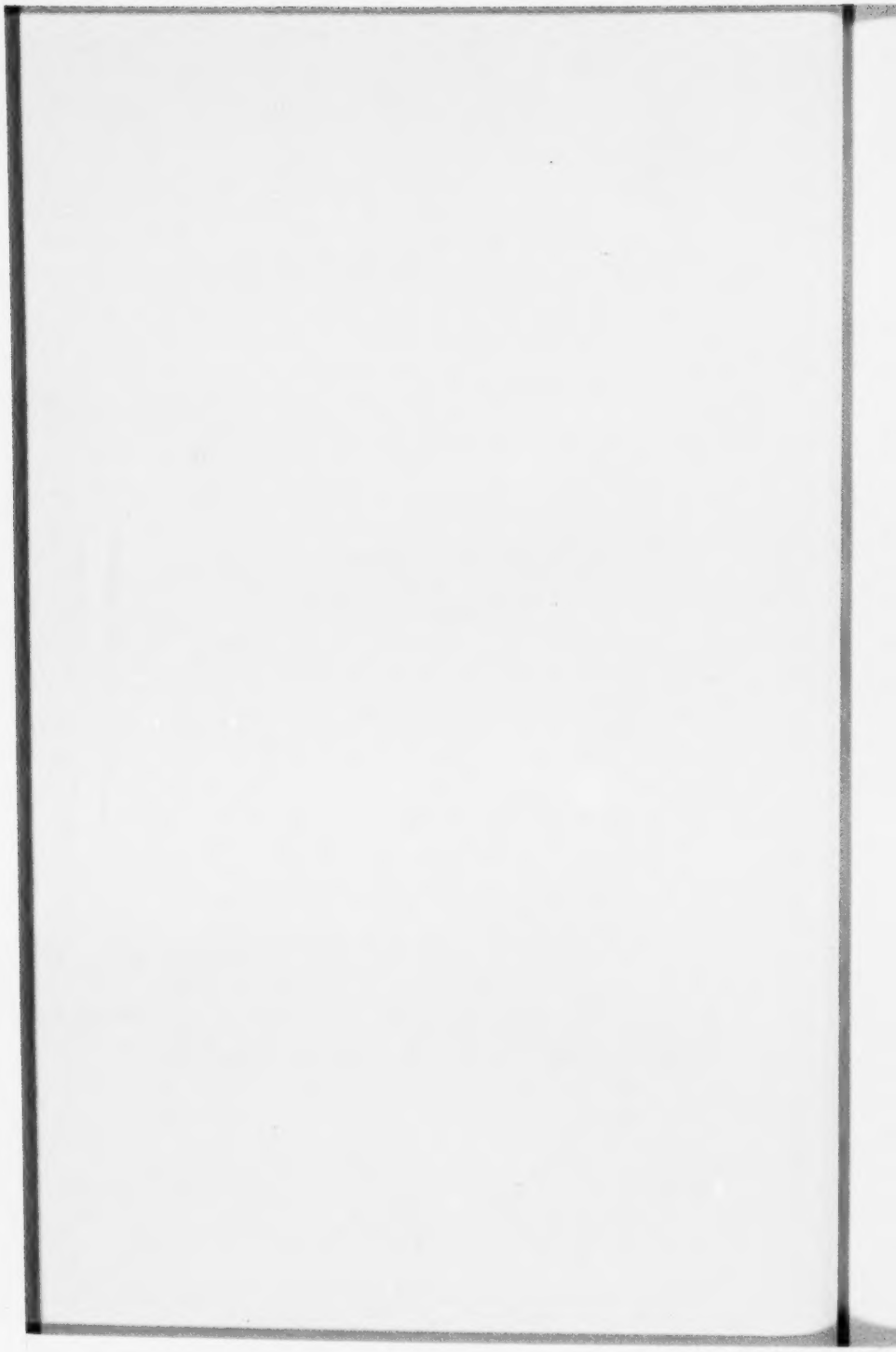

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 634

GEORGE COTROS ET AL., PETITIONERS

v.

NASHVILLE TRUST COMPANY, EXECUTOR UNDER THE WILL OF CHARLES M. MCCABE, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the District Court of the United States for the Middle District of Tennessee (R. 68–76) is not officially reported. The opinion of the Circuit Court of Appeals (R. 86–90) is reported in 120 F. (2d) 157.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 5, 1941 (R. 85). A petition for a rehearing, or to amend the decree, was filed June 30, 1941 (R. 91–95), and on August 15, 1941, the Circuit Court of Appeals entered an order amending the mandate (R. 97). The petition for a writ of certiorari was filed September 22, 1941. The jurisdiction of this Court is conferred under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayers operating under an indenture of trust constituted an association taxable as a corporation within the meaning of Sections 801 (a) (2) and 1001 (a) (2) of the Revenue Acts of 1934 and 1936, respectively.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 10–15.

STATEMENT

The findings of the District Court together with the contents of the exhibits may be summarized as follows (R. 68–76, 80):

In August 1933 the Lincoln Oil Company, Inc., a corporation engaged in developing oil property, conveyed an undivided one-third interest in a leasehold of certain Louisiana oil lands to George

Cotros, John A. Papageorge, and Nick Taras, of Memphis, Tennessee. Cotros, Papageorge, and Taras agreed to defray one-third of all the necessary expenses incurred by the oil company in drilling and developing oil wells upon the property until discovery of oil, and in fact did pay $20,000 in cash, which was their estimated share. After the discovery of oil the maintenance, operation, and production expenses were to be paid from the oil revenues and defrayed in proportion to the interests held by the respective parties (R. 69). The Lincoln Oil Company also agreed to keep the three grantees fully advised as to the work being done in the way of drilling, to accord them a full accounting of all expenses, furnishing a complete statement and making available at all times the books and records pertaining to the operations, and to supply the grantees with a complete log and samples of cores on each well (Ex. "D," R. 80).

Shortly after the conveyance, the Lincoln Oil Company began drilling operations (R. 70). On or about February 14, 1934, Cotros, Papageorge, and Taras executed a revocable power of attorney authorizing the oil company to transact all necessary business pertaining to the drilling of wells, payment of expenses, and collection of revenues. All of the oil wells in question were drilled by the company without any further assistance from the three grantees (R. 73). But before completion of the discovery well, Cotros, Papageorge, and Taras

decided that they did not wish to venture the entire $20,000 themselves (R. 70).

Accordingly, on April 17, 1934, Cotros, Papageorge, and Taras entered into a participation agreement with more than twenty of their friends. In the agreement it was expressly provided that the three grantees, in whose name title to the leasehold interest stood, were trustees for the benefit of all parties whose names were annexed to the instrument and that they were given full power and control of the leasehold interest, to manage it as they saw fit, to sell or transfer it at any time and for any amount which to them seemed proper (R. 26, 70–71). It was also provided that the parties whose names were annexed to the instrument, excluding Cotros, Papageorge, and Taras, were entitled to share in the net profits derived from the production of oil, gas, or minerals from the leasehold interest in proportion as the amounts set opposite their respective names stood in relation to the sum of $20,000, and that Cotros, Papageorge and Taras were entitled to share equally in the remaining net profits (Ex. "B," Items 1, 2, R. 25). In return, the parties whose names were annexed to the instrument agreed to pay to the three trustees the sums set opposite their names (Ex. "B," Item 5, R. 26). The parties who signed the agreement other than Cotros, Papageorge, and Taras, numbered twenty-one, and the total funds which they advanced amounted to $4,150 (R. 71–72). They

were not furnished certificates or evidences of ownership (R. 72–73). Subsequently, at least two of the parties transferred their interests to third persons (R. 73).

After the Lincoln Oil Company completed its first well, it drilled two additional wells (R. 73). When the wells started producing, the share of the net revenues belonging to the taxpayers was forwarded to the trustees by check of the Lincoln Oil Company. These checks were deposited in a bank. Pro rata distribution to the parties who signed the agreement of April 17, 1934, was then made by an employee of the company of which Mr. Cotros was president (R. 73). Cotros, Papageorge, and Taras had no books other than the pass book furnished them by the bank where the oil revenues were deposited and a check book evidencing payment of the pro rata distributions (R 73). Only one meeting was held by the parties: when the Lincoln Oil Company offered to purchase their one-third leasehold interest, the parties were called together and decided to decline the offer (R. 73).

On February 4, 1938, the Collector of Internal Revenue collected from the taxpayers capital stock tax, interest, and penalties for the years 1934 to 1937, inclusive, and also corporate income and excess profits taxes for 1934 and 1935, all of which were paid under protest (R. 74).[1] Taxpayers contended

[1] The portion of taxes representing excess profits tax and interest is not in issue here.

that they did not constitute an association taxable as a corporation, and therefore were not subject to a capital stock tax, corporate income tax, or excess profits tax (R. 74–75). After filing appropriate claims for refund, they brought suit in the District Court, which held that the taxpayers did not constitute an association and entered judgment in their favor (R. 77–78). The court below reversed (R. 85, 97).

ARGUMENT

The basic principles for ascertaining whether this trust is an association taxable as a corporation have already been outlined by this Court in four companion cases. *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helvering* v. *Coleman-Gilbert Associates,* 296 U. S. 369; *Swanson* v. *Commissioner,* 296 U. S. 362; *Helvering* v. *Combs,* 296 U. S. 365. Here the taxpayers' request for certiorari rests upon the contention that the court below has misapplied these principles to the particular facts. We submit that the decision is in accordance with the established law and that there is no conflict with the decisions of other circuits.

As pointed out by the court below (R. 88–90), this case is governed by *Helvering* v. *Combs.* In each case a trust was created by an indenture, and the object of each trust was to participate in the development of oil wells. It is true here that Cotros, Papageorge, and Taras had originally undertaken to carry their share of the expenses alone,

but the purpose of the subsequent trust arrangement was to spread it among a larger group of participants (R. 24–25). The existence of a regular business purpose is thus made plain. In both cases the functions actually performed by the trustees were limited;[2] but the issue is not whether the trustees were themselves active. Persons engaged in any business may act through agents, and here the Lincoln Oil Company, Inc., managed and operated the taxpayers' share of the leasehold by virtue of a power of attorney executed by the trustees.[3] Although taxpayers urge that the trust arrangement should not be classed as an association because liability of the participants for business losses is not limited to the amount of their investment, that position appears untenable; the indenture here closely resembles that of the *Combs* case in respect of limitation on liability—in neither case did the participants obligate themselves beyond their original contribution—and this Court plainly stated that the participants there "* * * avoided the characteristic responsibilities of partners and secured advantages analogous to those which pertain

[2] In this connection it should be noted that in the *Combs* case, prior to the formation of the trust, the parties had entered into an agreement by which a driller took full responsibility for sinking the well in consideration of a percentage of the oil. (Record, *Helvering* v. *Combs*, October Term, 1935, No. 238, pp. 36–42.)

[3] As the Circuit Court of Appeals has noted, the fact that the power of attorney antedated the trust agreement is of no significance, since it was revocable at any time (R. 90).

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to corporate organization. * * *" (296 U. S. 365, at 368–369).

There appears to be only one relevant distinction from the situation in *Helvering* v. *Combs*; here no formal certificates of interest were issued to the participants. However, as this Court stated in *Morrissey* v. *Commissioner*, "* * * the test of an association is not to be found in the mere formal evidence of interests or in a particular method of transfer." (296 U. S. 344, at 358.)

There is no conflict with *Lewis & Co.* v. *Commissioner*, 301 U. S. 385, as alleged. In that case there was no group of persons associated in a business enterprise. There the trust form was adopted by a single landowner for the benefit of herself and her husband.

The taxpayers urge also that the decision below is in conflict with five decisions of circuit courts of appeals. Those and the remaining cases upon which the taxpayers rely represent a class of decisions which this Court has persistently declined to review. See Government's petition for certiorari in *Helvering* v. *Cleveland Trust Co.*, No. 764, October Term, 1940, certiorari denied, 312 U. S. 704; *Lee H. Marshall Heirs* v. *Helvering*, No. 110, October Term, 1940, certiorari denied, 311 U. S. 658; *Kettleman Hills Royalty Syndicate No. 1, a Trust*, v. *Helvering*, No. 958, October Term, 1940, certiorari denied, May 26, 1941.

CONCLUSION

The decision of the court below correctly applies to the facts of this case the statute and the governing principles established by decisions of this Court. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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LEONARD C. MEEKER,
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OCTOBER 1941.

APPENDIX

Revenue Act of 1941, 48 Stat. 680:

> SEC. 801. DEFINITIONS.
> (a) When used in this Act—
> * * * * * *
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies.
> * * * * * * *
> U. S. C., Title 26, Sec. 1696.)

Section 1001 (a) (2) of the Revenue Act of 1936, 49 Stat. 1648, is precisely the same as Section 801 of the Revenue Act of 1934.

Treasury Regulations 86, promulgated under the Revenue Act of 1934 [Articles 1001–1, 1001–2, 1001–3 and 1001–4 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, are the same as Articles 801–1, 801–2, 801–3, and 801–4 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, except for the addition of several sentences which are enclosed in brackets]:

> ART. 801–1. *Classification of taxables.*— For the purpose of taxation the Act makes its own classifications and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities.

(See article 801–3.) The term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See article 801–4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See articles 801–2 and 801–4.) The definitions, terms, and classifications, as set forth in section 801, shall have the same respective meaning and scope in these regulations.

ART. 801–2. *Association.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization created for the transaction of designated affairs, or the attainment of some object, which like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Act, a trust or an estate

or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

ART. 801–3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. [The nature and purpose of a cooperative undertaking will differentiate

it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.]

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation. [However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.]

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode

of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officers," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "bylaws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that be-

tween the activity or purpose for which an ordinary strict trust of the traditional type would be created and the activity or purpose for which a corporation for profit might have been formed.

ART. 801–4. *Partnerships.*—The Act provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Act, a trust, estate, or a corporation. On the other hand, the Act classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. * * *

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